Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 1996

SCOT A. REINERT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Theodore Simon
35th Floor
1818 Market Street
Philadelphia, PA 19103
(215) 563-5550

Counsel for Petitioner Reinert

38 pp

QUESTIONS PRESENTED

1. May law enforcement officers that conducted an intrusive and pervasive five (5) hour search of the Petitioner's home, without a search warrant when no exigent circumstances existed, be permitted to search, seize and obtain evidence from the Petitioner's residence or does it violate the Fourth and Fourteenth Amendments and the holdings in Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978) and Thompson v. Louisiana, 469 U.S. 17, 83 L.Ed.2d 246, 105 S.Ct. 409 (1985)?

2. Were Petitioner's Fifth and Sixth Amendment rights violated when statements were admitted that were involuntary and/or where he was in custody and subject to interrogation without first being advised of his Miranda rights and/or was he physically and mentally capable of knowingly, intelligently and voluntarily waiving his constitutional rights while he was being treated for life-threatening injuries in an ambulance, hospital, and after emergency surgery?

3. Was Petitioner denied his Fifth and Sixth Amendment rights to effective assistance of trial counsel, due process, and a fair trial where trial counsel failed to: (A) call available expert medical and psychiatric witnesses to testify that Petitioner's physical and mental condition precluded a voluntary statement and/or a knowing, intelligent and voluntary waiver of his Miranda rights at the suppression hearing and at trial? (B) inform Petitioner, a person with no prior record, of his right to testify at the suppression hearing? (C) testify being a percipient witness of Petitioner's condition at the time of his statement, during the suppression hearing and at trial and/or withdrawn if necessary? (4) call an available expert to testify about the drug Prozac per the trial court's ruling?

4. Was Petitioner denied his Fifth and Sixth Amendment Rights when the trial court declared all lay testimony concerning the victim's use of Prozac inadmissible?

TABLE OF CONTENTS

Page

Questions Presented..... i

Table of Authorities .....ii-iv

Opinions Below..... 1

Jurisdiction 1

Constitutional Provisions Involved..... 1

Statement of the Case..... 2
Procedural History..... 2
Statement of the Facts..... 3

Reasons for Granting the Writ 8

1. May law enforcement officers that conducted an intrusive and pervasive five (5) hour search of the Petitioner's home, without a search warrant when no exigent circumstances existed, be permitted to search, seize and obtain evidence from the Petitioner's residence or does it violate the Fourth and Fourteenth Amendments and the holdings in Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct.2408 (1978) and Thompson v. Louisiana, 469 U.S. 17, 83 L.Ed.2d 246, 105 S.Ct. 09 (1985)?
..... 8

2. Were Petitioner's constitutional rights under the Fifth and Sixth Amendment violated when statements were admitted that were involuntary and/or where he was in custody and subject to interrogation without first being advised of his Miranda rights and/or was Petitioner physically and mentally capable of knowingly, intelligently and voluntarily waiving his constitutional rights while

rights while Petitioner was being treated for life-threatening injuries in an ambulance, hospital, and after emergency surgery?
.....14

3. Was Petitioner denied his Fifth And Sixth Amendment rights to effective assistance of trial counsel, due process, and a fair trial where trial counsel failed to: (A) call available expert medical and psychiatric witness to testify that Petitioner's physical and mental condition precluded a voluntary statement and/or a knowing, intelligent and voluntary waiver of his Miranda rights at the suppression hearing and at trial? (B) inform Petitioner, a person with no prior record, of his right to testify at the suppression hearing? (C) testify being a percipient witness of Petitioner's condition at the time of his statement, during the suppression hearing and at trial and/or withdrawn if necessary? (4) call an available expert to testify about the drug Prozac per the trial court's ruling?
.....25

4. Was Petitioner denied his Fifth and Sixth Amendment Rights when the trial court declared all lay testimony concerning the victim's use of prozac in admissible?
.....29

Conclusion..... 30

Appendix

Opinion, Superior Court of Pennsylvania .....A 1-10

Order and Opinion, Trial Court
Motion to Suppress,September 13, 1991 .....B 1-15

Order and Opinion Trial Court
Post Trial Motions, November 15, 1994 .....C 1-18

Order, Supreme Court of Pennsylvania
denial Petition for Allowance
of Appeal ..... D 1

Order, Supreme Court of Pennsylvania -
denial Reconsideration for Petition
for Allowance of Appeal ..... E 1

Dr. Lynn Alison Bornfriend, M.D. affidavit ..... F 1-5
Dr. Lynn Alison Bornfriend, M.D. supp. aff. ..... FF 1-2

Dr. Robert L. Sadoff, M.D. letter ..... G 1-5
Dr. Robert L. Sadoff, M.D. supp. letter ..... GG 1-2

Scot A. Reinert, affidavit ..... H 1-4

Janet Ketner, affidavit ,mother of Scot Reinert ..... I 1-2

Charlie Ketner, affidavit,father of Scot Reinert ..... J 1-2

Dianne M. Dickson, Trial Counsel, affidavit ..... K 1-2

TABLE OF CITATIONS

CASES PAGE

FEDERAL CASE LAW

Arizona v. Hicks
480 U.S. 321, 327, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347, 355 (1987) 11

Beecher v. Alabama
389 U.S. 35, 38 15

Blackburn v. Alabama
361 U.S. 199, 208 15

Chapman v. California
386 U.S. 18, 23 and n.8 29

Coolidge v. New Hampshire
403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971) 9

Davis v. North Carolina
384 U.S. 737, 741-742 15

Haynes v. Washington
373 U.S. 503, 518 15

Mincey v. Arizona
437 U.S. 385, 98 S.Ct. 2408, 5 L.Ed. 2d 290 (1978) 8, 9, 10, 12, 13, 15, 16, 17, 20

Miranda v. Arizona
384 U.S. 436 (1966) 7, 8, 14, 15, 17, 18, 19, 20, 21, 23, 25, 27, 28

Payton v. New York
445 U.S. 573, 590, 63 L.Ed.2d 639 100 S.Ct. 1371 (1980) 9

Rhode Island v. Innis
446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980)..... 18

Stroble v. California
343 U.S. 181, 190..... 20

Strickland v. Washington
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984) 26

Thompson v. Louisiana
469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) .....8, 9, 10, 12, 13, ... 16, 17, 18

Townsend v. Sain
372 U.S. 293, 307..... 15

United States v. Morgan
743 F.2d 1158, 1162 (6th Cir. 1984) 10

United States v. United States District Court
407 U.S. 297, 313, 32 L.Ed. 752, 92 S. Ct. 2125 (1972)..... 9

Welsh v. Wisconsin
466 U.S. 740, 750, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984) 9

Wong-Sun v. United States
371 US. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 14

Commonwealth v. Lewin
407 Mass. 617, 555
N.E. 2d 551 (1990) 9

Commonwealth v. Perry
475 Pa. 1, 379 A.2d 545 (1977).....21

STATUTES

42 Pa. C.S.A. 7101 21

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT PENNSYLVANIA

Scot A. Reinert, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Superior Court of Pennsylvania entered on January 23. 1996, affirming his conviction for murder.

OPINIONS BELOW

The Superior Court of Pennsylvania affirmed Petitioner's conviction and sentence in the Common Pleas Court of Lehigh County of Pennsylvania which was filed on January 23,1996, Appendix A. The Trial Court denied Petitioner's Pretrial Motions to Suppress in an Order and Opinion (App. B) and further denied his Post-trial Motion in an Order and Opinion (App. C.)

JURISDICTION

The Supreme Court of Pennsylvania denied, by Order, Reconsideration of Petitioner's Request for Allowance of Appeal to the Supreme Court, on December 11, 1996, having previously denied his Petition for Allowance of Appeal on September 26, 1996 and affirming Judgment and Opinion of the Pennsylvania Superior Court of January 23, 1996. Petitioner timely filed an Application for Extension of Time to File Petition for Writ of Certiorari, Application No. A-641, which was granted on March 7, 1997 and extending the time in which to file said Petition to and including May 10, 1997. Jurisdictionally, Petitioner invokes 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides in part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment provides in part

"...nor shall any state deprive any person of life, liberty or property without due process of law...".

The Sixth Amendment provides in part:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury....; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fifth Amendment provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

PROCEDURAL HISTORY

Petitioner was arrested on March 10, 1991, charged with criminal homicide, as a result of the death of Sean Brady which occurred in the Petitioner's home. Pre-trial motions including Motions to Suppress physical evidence and statements were heard before the Court of Common Pleas, Lehigh County, Criminal Division, Carol K. McGinley, J., on August 20-21, 1991, and denied by on September 13, 1991.

A jury trial commenced on January 15, 1992. A verdict of guilty of murder in the first degree resulted and Petitioner was sentenced to life imprisonment. Timely post-trial motions were denied as to all issues on November 15, 1994.

Petitioner was represented at all stages to this point by Dianne Dickson, Esq. and Wallace Worth, Esq., of Worth Law Offices. Present undersigned counsel, entered his appearance to represent the Petitioner in the Superior Court.

Through new counsel, Petitioner appealed the Judgment of Sentence to the Superior Court submitting that serious errors and departures, preserved below, were committed by the court. Petitioner at the first opportunity raised the issue of the effectiveness of his trial counsel by submitting a number of affidavits/letters in support thereof and attached hereto. On January 23, 1996, the Superior Court denied relief on all grounds in a Memorandum Opinion. The Panel denied the ineffective claims without an evidentiary hearing. A Motion for Reconsideration to Panel and/or Reargument was denied by the Court on March 29, 1996.

A Petition for Allowance of Appeal and a Petition for Reconsideration of Denial of Petition for Allowance of Appeal were filed and denied by the Supreme Court, respectively,

on September 26, 1996 and December 11, 1996.

All claims raised were raised pursuant to both the Pennsylvania and United States Constitutions.

STATEMENT OF THE FACTS

On March 10, 1991, the Petitioner's mother, Mrs. Janet Ketner, phoned Scot Reinert at his home. During this call, Reinert told her that the KKK was present, there was a body in his house, S.N.T.[1] , 8/21/91, 28, and that the KKK had marked his home with a flag in the yard. Id. Alarmed and frightened by her son's remarks, she and her husband rushed to his home. They found Reinert sitting on the first floor covered in blood, with very large, visible gashes on both his wrists. Id. at 30; N.T[2] , Vol. V, 148. Mr. Ketner called 911 and described Petitioner as "delirious". Defense Trial Exhibit 26. Shortly, police and ambulance services arrived. Mrs. Ketner testified at both the suppression hearing and trial that her son appeared very strange, made a number of hallucinatory remarks regarding the presence of family members, the police, a naked Chinese man, and a disappearing corpse. S.N.T., 30-32; N.T., Vol V,. Mr. Ketner confirmed Reinert's poor mental/physical condition. He stated that "his eyes were very wide and darting back and forth. He looked very, very strange." S.N.T., 44. He first thought Reinert was under the influence of drugs. S.N.T., 44. It was also determined that Petitioner had attempted suicide by drinking alcohol, taking sleeping pills, and slashing his wrists.

Mertz, the first officer to arrive at the Reinert home at 12:11 p.m., checked on Reinert and his parents in the first floor living room, then headed up the stairs to check the report, by the parents, of a body on the third floor. N.T., Vol. I, 28, 37. Mertz testified that he checked the rooms on the second floor, including the bathroom, a middle room and Mr.

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[1] "S.N.T." refers to Suppression Hearing Notes of Testimony, August 20-21, 1991. The Superior Court permitted Petitioner to proceed upon the original record, as such, there is no reproduced record in the court below, and citations are to the trial transcript. The letters/affidavits filed and accepted by the Superior Court in support of ineffective claims are appended.

[2] "N.T." refers to Trial Notes of Testimony, January 17-30, 1992.

Reinert's bedroom and that he saw no one. Id. at 38. When he reached the third floor, Mertz checked Brady, determined he was dead; that medical assistance was not required, and then searched the third floor to insure that no one else was on the floor. Id.

Moments after Mertz's arrival at 12:11 p.m., three more Allentown police officers, Zimmerman, Lembach and Brader arrived at the home, followed shortly by the paramedics. Id. at 28. Zimmerman testified that he ran to the third floor to see if Mertz was all right, then, following Mertz's request to "secure the house", returned to the first floor living room where he remained with Reinert and his parents. Id. at 140-1. Lembach and Brader walked to the back door of Reinert's home, checking all the rooms on the first floor to insure no one was present. Lembach ordered Brader to remain on guard at the back door of the residence. Id. at 106. Lembach then returned to the first floor living room with Zimmerman, Reinert and his parents. Id. at 107. At this point, law enforcement officers had completed their protective sweep of the Reinert home; the police had checked for other potential victims or culprits, found none, and secured the premises.

The paramedics preliminarily treated the Petitioner, who was suffering from life threatening injuries, including multiple wounds to the abdomen, multiple lacerations of the wrist, and an injured ankle. Reinert's blood pressure was down, his pulse rate was up, and some of the answers he gave to the treating persons were incorrect and contradictory.[3] The paramedics then took the Petitioner to the ambulance by supporting him on either side by his arms. N.T., Vol. V, 152. They were immediately followed by Officers Zimmerman and Lembach. Zimmerman was ordered by his superiors to remain with Reinert, and stay in contact with him. S.N.T., 8/20/91, 65. Reinert was laid on a stretcher inside the ambulance, had an oxygen mask placed over his face, was given I.V.'s via his arms, and was hooked up to a electrocardiogram. Officer Lembach stood in the doorway of

[3] For instance, during the course of medical treatment, Reinert was asked about allergies. He told the paramedics he had none, N.T., Vol. I, 84, told the nurse he had one, S.N.T., 8/20/91, 89, and testified at trial that he actually has three, penicillin, codeine, and sulfur, N.T., Vol. VII, 163.

the ambulance and Officer Zimmerman sat near Reinert's head. The wounds in Reinert's abdomen, from which his intestines were protruding, were first noticed when he was in the ambulance, S.N.T., 8/20/91, 50. Upon the discovery of the abdomen wound, Paramedic Snyder asked Mr. Reinert "what happened?" S.N.T., 8/20/91, 14. Petitioner, while wearing the oxygen mask, stated "I stabbed him with a butcher knife, then I did myself." Id.; N.T., Vol. I, 62. Paramedic Snyder then turned to Officer Zimmerman and told him, "I think you ought to step in." S.N.T., 8/20/91, 14. Officer Zimmerman then, without advising Reinert of his Miranda rights, "directed a question saying what happened?" Id. at 50. Petitioner responded to this question by stating, "I think I killed him. I think I stabbed him." Id. Then, while paramedics were working on Reinert and while still wearing the oxygen mask, Zimmerman read Reinert his Miranda rights. Id. Per Zimmerman, Reinert responded to the question, "do you understand these rights" by saying: "As best he could, yeah, he -- they were working on him and he, you know, he kind of nodded and the he said yes or yeah." Id. at 52. Zimmerman then asked another question, to which Reinert said "I stabbed him. I think I killed him." Id. at 143. Finally he asked Reinert who he had killed, and he responded, "Sean, Sean Brady," "with a butcher knife." Id. at 52-3.

Officer Lembach left the ambulance, returned to the Reinert home and spoke to Sgt. Trimmer, a supervisor at the scene. N.T., Vol. I, 112. Trimmer relieved Officer Brader of his duty to guard the back door, N.T., Vol. I, 121, and sent him in the ambulance with Mr. Reinert, Officer Zimmerman, and the paramedics. Id. at 111-12. Lembach then maintained a constant guard over the Ketners and Cindy Mellinger, a friend of Mr. Reinert, in the first floor living room. Id. at 112. The ambulance left the Reinert's home at 12:28 p.m., for the hospital. Reinert's emergency treatment continued.

The home secured, the officers awaited the arrival of lead detectives, Stauffer and Granitz, who arrived at Reinert's home at approximately 12:45 p.m. , and Sergeant Moyer, a police photographer, who arrived at approximately 1:00 p.m. Detective Stauffer spoke with Officer Mertz and Sergeants Trimmer and Higgins, all of whom appraised Stauffer of all they knew about the situation up to that point. S.N.T.,

8/20/91, 126. Police then searched both the victim's and Reinert's cars without a warrant. N.T., Vol. I, 134.

Approximately 1 hour after the house was secured, Detective Stauffer, Detective Granitz, who described himself as the "evidence" or "bag" man, S.N.T., 184 and Moyer began an intrusive, thorough warrantless search of the Reinert home, which included the painstaking, slow, deliberate and methodical room by room photographing and videotaping of the entire home, and lasted more than five (5) hours. The detectives and Sgt. Moyer rummaged through garbage cans, S.N.T., 8/21/91, 25, overturned mattresses, opened drawers, S.N.T., 8/21/91, 24, and looked through medicine cabinets, eventually finding and seizing 64 items, including torn-up notes, a knife, bloody clothing, and magazines hidden under mattresses. See, Com. Trial Exhibits 33, 64, 66.

In the hospital, at 12:45 p.m., Reinert underwent immediate preparatory treatment for surgery in the "Code Red" room by Nurses Gavigan and Lombardo. Police officers were ordered by their superiors to stand guard outside his room. Officer Zimmerman asked Gavigan, prior to his treatment of Reinert, to note down anything that Reinert said which may be of use to the police. S.N.T., 78. During this preparation, Nurse Gavigan asked Reinert some questions, to which Reinert responded that he had been fighting with his friend with a knife, they had fallen off the bed and that he, the friend, might have done this. Reinert also acknowledged he might have wounded himself, and that he had fallen down the stairs. S.N.T., 8/20/91, 79. Officer Zimmerman testified Nurse Gavigan reported to him three times during Reinert's treatment. Id. at 90, S.N.T., 8/20/91, 70.

Reinert entered surgery at approximately 1:15 p.m. Just prior, Reinert had been given Pentathol, a barbiturate, Norcuron, a muscle relaxant, Anectin, another muscle relaxant, Fentanyl, a synthesized narcotic (not mentioned in trial court opinion), and Forane as anesthesia. N.T., Vol. III, 15. Surgery lasted approximately two and one-half hours. It was discovered that one of the knife wounds in Reinert's abdomen had also cut his liver. Reinert had lost 200 cc's of blood during the operation, Id. at 16, and a quart of blood prior to being treated by the paramedics. N.T., Vol. IV, 75. Reinert experienced post-operative pain, Id. at 61. He was given

Robinal, a sedative and muscle relaxant, at 3:30 pm., S.N.T., 8/21/91, 8, and Cefoxitan at 6:00 p.m. Sometime after 3:30 p.m., Reinert was taken to the Shock Trauma Unit. On the orders of superiors, officers remained guarding Petitioner's surgery room, S.N.T., 8/20.91, 55, and inside his recovery room. S.N.T., 8/20/91, 135. Several of Reinert's wounds, including those on his thumb and in his abdomen, were determined to be defensive wounds. Others were self-inflicted.

The Ketners and Cindy Mellinger were detained at Reinert's home by the police and were not given permission to leave until 4:00 p.m. They were kept separated from Reinert and prevented from learning his condition, providing support or obtaining counsel. Detectives Stauffer and Granitz left Reinert's home at approximately 6:18 p.m. S.N.T., 8/20/91, 131. Thus, this second warrantless search of the Reinert home lasted more than 5 hours. Parents arrived at the hospital about 5 p.m., but were not allowed to see Reinert and further isolated from him on the orders of the police until the detectives, who had not yet arrived, questioned Reinert. S.N.T., 8/21/91, 33.

At 7:47 p.m., Detectives Stauffer and Granitz arrived at the hospital. S.N.T., 8/20/91, 132. They came from the police station, without either a tape recorder or video recorder. They interviewed Reinert while he was laying in his recovery room, wrists and abdomen bandaged, attached to I.V.'s and other emergency equipment. Id. at 197. The guarding, uniformed police officer inside Reinert's room was told to leave the room by the detectives. Id. They closed the screen surrounding Reinert's bed, stood on either side of him near his head, and began questioning him after reading him his Miranda rights. Id. The two detectives present differing accounts. Stauffer stating that Reinert answered the question (Do you waive these [Miranda] rights?) by saying "yes", while Granitz states that Reinert merely nodded his head. Questioning continued for forty-five minutes, during which Reinert gave his most incriminating statement when he allegedly said that he obtained a knife, went to see Mr. Brady, who was in bed, and stabbed him (a critical Commonwealth piece of evidence to seek to establish premeditation). Detectives Stauffer and Granitz finished questioning him at

approximately 8:37 p.m. and Detective Stauffer ordered that Reinert remain under police guard. S.N.T., 8/20/91, 142.

Only after Stauffer and Granitz left were the parents, Cindy Mellinger, Reinert's priest and attorneys allowed to visit him. S.N.T., 8/21/91, 34. Lay testimony was presented that Reinert was weak, in pain, soft-spoken, "thick-tongued" and hard to understand. S.N.T., 8/21/91, 46. Reinert received morphine for the pain at 10:00 p.m. on Sunday, and three times in the early morning and afternoon of March 11, 1991.

At trial, Reinert's defense was that he believed Brady was attempting to commit suicide when he entered his room. Reinert stated that Brady reached for the knife, which was already in the room, on his own, and when Reinert attempted to intervene a struggle occurred over the knife.

Prior Trial counsel, among other things, failed to obtain medical experts for the defense that would and could have testified that Reinert was incapable of making a voluntary statement, physically and mentally incapable of executing a knowing, intelligent and voluntary waiver of his Miranda rights given his condition. See, Affidavits filed in the Superior Court including affidavits/letters of two psychiatrists, Dr. Robert L. Sadoff, App.G, and Dr. Lynn Bornfriend, App.F, Scot Reinert, App.H, both parents, App. I, App. J, and prior trial counsel, Dianne M. Dickson, App.K, all in support of reversal or minimally an evidentiary hearing. Also see supp. letters of Dr. Sadoff, App."GG", and Dr. Bornfriend, App.FF.

REASONS FOR GRANTING PETITION

1. Police that conducted an intrusive and pervasive five (5) hour search of Petitioner's home, without a search warrant, when no exigent circumstances existed, were not permitted to search, seize and obtain evidence from Petitioner's residence in violation of the Fourth and Fourteenth Amendments and Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978) and Thompson v. Louisiana, 469 U.S. 17, 83 L.Ed.2d 246, 105 S.Ct. 409 (1985).

The warrantless search and seizure that occurred violates long-standing state and federal jurisprudential

principles. In the absence of exigent circumstances, a search warrant must be obtained, particularly where the area to be searched is the home: the most protected area. The facts and legal issues are controlled by United States Supreme Court decisions, Mincey v. Arizona 437 U.S. 385, 98 S.Ct. 2408 (1978) and Thompson v. Louisiana , 469 U.S. 17, 105 S.Ct. 409 (1984).

Here, the opportunity exists for this Court to apply Federal jurisprudential search and seizures principles based on the similar factual and legal settings of Thompson and Mincey, and provide clear continuing authority to Pennsylvania authorities and other States that the historic warrant requirement cannot be flouted. Herein, Petitioner has also not received adequate appellate review as the Pennsylvania Superior Court failed to review the issue other than to cite to the erroneous determination of the trial court. And see, Commonwealth v. Lewin, 407 Mass. 617, 555 N.E.2d 551(1990) (state Supreme Court, suppresses evidence, secured under similar facts including photographs and videotape made in secondary warrantless search.)

The Fourth Amendment prohibits governmental intrusions into a private dwelling without a warrant supported by probable cause, subject only to a few carefully delineated exceptions. Thompson v. Louisiana , 469 U.S. 17,859 F.2d 1501, 19-20, 83 L. Ed. 2d 246, 105 S. Ct. 409 (1984). See also Payton v. New York, 445 U.S. 573, 590, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."); Coolidge v. New Hampshire , 403 U.S. 443, 474-75,29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). In fact, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972). In view of this strong command, the Supreme Court has declared that searches and seizures inside a residence without a warrant are "presumptively unreasonable," Payton v. New York, 445 U.S. at 586, and the police bear a "heavy burden when attempting to demonstrate an urgent

need" that might justify a warrantless entry. Welsh v. Wisconsin, 466 U.S. 740, 750, 80 L. Ed. 2d 732, 104 S. Ct. 2091 (1984). See also United States v. Morgan, 743 F.2d 1158, 1162 (6th Cir. 1984) ("the burden is on the government to demonstrate exigency") (cases cited therein), cert. denied, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 (1985).

Here, as in Mincey and Thompson, officers arrived at a homicide scene and conducted a protective warrantless search of the home to ensure that there were no other victims, culprits or threat that evidence would be destroyed or removed. Once this initial protective sweep was conducted, the residence was secured and any exigent circumstances which justified the initial protective search ceased to exist. A search warrant was required. Petitioner had been removed from the premises, higher ranking lead detectives arrived and were informed that the murder scene had been secured. Without first obtaining a search warrant, the later arriving lead detectives with the aid of a police photographer and videographer, commenced a painstaking, slow, deliberate, methodical five (5) hour secondary warrantless search moving room to room throughout the entire house, while at the same time photographing and videotaping. It is this secondary warrantless search (as in Mincey and Thompson), (as well as the first search) which occurred after the exigent circumstances had dissipated, that is violative of the Fourth Amendment Thus, all evidence observed, searched, seized or obtained during the course of the second warrantless search must be suppressed along with any fruits thereof.

The uncontroverted facts of record reveals that the Reinert home was secured, within minutes after an initial protective sweep of the premises by police. Any argument that lead Detectives Stauffer and Granitz, were attempting to "secure the premises" is unavailing, as (1) that already occurred approximately one hour earlier, and (2) under any definition - a five (5) hour slow and methodical room by room investigation, photographing and videotaping belies any notion of a prompt or protective sweep of the premises. Unless the police expected to find injured or threatening individuals in medicine cabinets, garbage cans, inside closed drawers, or under mattresses or dressers, the conduct of the police officers during the second warrantless search was

conducted purely for the purposes of gathering evidence and investigating the crime.

Further, the trial's court reliance on the plain view exception and Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) is misplaced as it cannot justify the officers' seizure of evidence in the instant case. The initial securing officers saw little, did not comply with the prongs of Hicks, and seized nothing. It was the impermissible secondary movement through the house that put them in the position to make a view to which they were not otherwise entitled without a warrant. Moreover, many of the items seized, including, the MEN magazine found under the Petitioner's bedroom mattress, a notebook found in bathroom, a bottle of People's pain reliever from medicine chest in bathroom, and a ripped up note and letter, respectively, found in the garbage cans of the 2nd floor bathroom and the kitchen, were not, and could not be, objects for which the police had, upon their discovery, probable cause to believe were linked to criminal activity. The seizure of these items is indicative of an intention to search and collect evidence without a warrant. Particularly in light of well-established caselaw which forbid police officers from moving objects, during the conduct of the search, to discover their incriminating character, if any. Arizona v. Hicks, supra. Here, the police not only moved Petitioner's property to reach certain evidence, but they also had to piece together certain evidence, i.e. the ripped-up note, before its incriminating character, if any, was revealed. Such evidence including all videotaping and photographing should be suppressed, as this occurred without a warrant. The crime scene was thoroughly under police control, and status quo was easily maintained, there was nothing preventing the police from seeking a warrant.

The Superior Court rejected Petitioner's ineffective claim that Officer Mertz should have been called as a witness in the suppression hearing, where he would have testified that he already performed a protective walkthrough, making Officer Stauffer's later search unlawful because he would have been merely cumulative to that of "Zimmerman and Lembach" (who) "testified that they had secured the crime scene and conducted a protective walk through before Officer Stauffer". Superior Court Opinion App. "A", 5. It is that

recognition that Zimmerman, Lembach and Mertz performed the protective walkthrough initially and prior to the later warrantless arrival of Stauffer that makes the second search unlawful. Within the same paragraph, the Panel states that the suppression court concluded that the search conducted by Officer Stauffer was lawful because he was "securing the crime scene and performing a protective walk through." Id. at 5. However, the Superior Court concluded to the contrary, that, Zimmerman and Lembach had already secured the premises.

Mincey v. Arizona 98 S.Ct. at 2408 (1978) and Thompson v. Louisiana , 105 S.Ct. at 409, have uniformly held that no "murder scene exception" to the warrant requirement exists and, thus, police must obtain a warrant to continue investigating a crime scene. In Mincey :

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case...There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search. 98 S.Ct. at 2414.

The Supreme Court in Thompson , on facts as close to the facts in the instant case as is possible , affirmed its holding in Mincey , and refused to create a "murder scene" exception to the warrant requirement. In Thompson , the Appellant shot her spouse, attempted to commit suicide by ingesting pills, reconsidered her suicide attempt and called her daughter. Similarly, the daughter called the police to Appellant's home, let the officers into the home, and the police performed a "cursory search" of the home and discovered the corpse of the victim in the bedroom and the Appellant in another room. As here, the police transported Appellant to hospital and secured the scene. Thirty-five minutes later , less time than here, members of the homicide unit arrived and

performed a follow-up investigation of the homicide and attempted suicide. In the Thompson search, which lasted two hours, the detectives examined each room of the house, and seized several items, including a pistol found inside a chest of drawers, a ripped up note in a wastepaper basket, and another letter, presumably a suicide note, inside a Christmas card on top of the chest of drawers. Id. at 410. As here, by the time of the homicide detectives arrival, the officers who first responded at the scene had already searched the home for suspects or other victims. Id at 410.

The Supreme Court rejected Louisiana's argument, similar to the trial court's here, that Mincey was distinguishable due to the length of the search, four days, as compared to Louisiana's two hour search of Thompson's home. The Reinert trial court did not address Thompson.

> Although we agree that the scope of the intrusion was certainly greater in Mincey than here, nothing in Mincey turned on the length of time taken in the search or the date on which it was conducted. A two-hour general search remains a significant intrusion on petitioner's privacy and therefore may only be conducted subject to the constraints - including the warrant requirement - of the Fourth Amendment. Thompson v. Louisiana, 105 S.Ct. at 411. (emphasis added).

Thus, the Thompson Court held that where, as here, the first search [for suspects or persons dangerous to the police or evidence] is completed prior to the commencement of the second search a warrant is required. Id. at 412. The Superior Court did not address Thompson, either. Given this Court's absolute refusal to weaken privacy rights by creation of a "murder scene exception", and its unwillingness to admit evidence seized without a warrant when a murder scene is already secured and/or no exigency exists, Petitioner maintains that the Commonwealth may not conduct a five hour, warrantless search of a home simply because they care to investigate a crime scene and do not want to take the time to apply for a search warrant. As such, all the items obtained, and fruits thereof physical or otherwise, during the illegal search of the Petitioner's home should have been

declared inadmissible as a violation of the Fourth /Fourteenth Amendment of the United States Constitution, including all items such as all physical evidence, observations, photographs and videotape. Wong-Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

2. Fifth and Sixth Amendments were violated when statements were admitted that were involuntary and/or where Petitioner was in custody and subject to interrogation without first being advised of his Miranda rights and/or was he physically and mentally capable of knowingly, intelligently and voluntarily waiving his constitutional rights while he was being treated for life-threatening injuries in an ambulance, hospital, and after emergency surgery.

The Superior Court erred when it failed to review, other than cite to the erroneous trial court opinion, that statements made by Reinert in the ambulance and at the hospital, both before and after his operation, were admissible. The trial court erred when it failed to suppress incriminating statements of varying degrees made by Reinert, which were involuntary, made while he was in custody, subject to interrogation and was suffering from life threatening physical wounds, including knife wounds to his abdomen which pierced his liver and from which his intestines were protruding. Mr. Reinert had also recently attempted to kill himself three times by slashing his wrists and ingesting sleeping pills with alcohol. He was forced to remain incommunicado for over nine hours and was kept isolated from his friends and family who had expressed a desire to see and speak to him. Statements were also obtained by law enforcement agents during the course of custodial interrogation prior to Reinert being read his Miranda rights. A number of statements are at issue, each illegal in their own right, and each tainting subsequent ones.

> ...any criminal trial use against a defendant of his involuntary statement is a denial of due process of law "even though there is ample evidence aside from the confession to support the conviction." (cases

omitted). If, therefore, Mincey's statements to Detective Hust were not "'the product of a rational intellect and a free will.'" Townsend v. Sain, 372 U.S. 293, 307, quoting Blackburn v. Alabama, 361 U.S. 199, 208, his conviction cannot stand. In making this critical determination, we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record. Davis v. North Carolina, 384 U.S. 737, 741-742; Haynes v. Washington, supra, at 515-516. Mincey v. Arizona 437 U.S. 385, 398; 98 S.Ct. 2408, 2416. (emphasis supplied),

THE STATEMENTS WERE INVOLUNTARY

Mincey v. Arizona, supra, provides controlling authority demonstrating the utter involuntariness of the statements:

> It is hard to imagine a situation less conducive to the exercise of "a rational intellect and a free will" than Mincey's. He had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. Although he had received some treatment, his condition at the time of Hust's interrogation was still sufficiently serious that he was in the intensive care unit. n14 He complained to Hust that the pain in his leg was "unbearable." He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation, since some of his written answers were on their face not entirely coherent. n15 Finally, while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, "at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation. Cf. Beecher v. Alabama, 389 U.S. 35, 38. Mincey v. Arizona 437 U.S. 385, 398; 98 S. Ct. 2408, 2416, 57 L. Ed. 2d 290 (1978).

CUSTODY IN THE AMBULANCE AND IN THE HOSPITAL

> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda

v. Arizona, 384 U.S. 436 ,444, 86 S. Ct. 1602, 1612. (1966).

Unlike other cases interpreting "custody" - due to Reinert's injuries he was physically and mentally unable to simply walk away from the questioning. This factor must be considered in a determination of custody and is a significant reason why this Court should accept this case for review. Petitioner was in custody from the moment he was taken from his home on March 10, 1991, as the record reflects:

1. Paramedics, assisted the injured Petitioner, to the ambulance by grabbing his arms and bringing him to the ambulance.
2. The paramedics willingly provided the police with access to the ambulance, and police enabled themselves to be in position to overhear questions placed to Mr. Reinert by the paramedics.
3. Officer Zimmerman was ordered to stay with the Petitioner, and he and Lembach did so.
4. The Petitioner was lying down on a stretcher, in an enclosed, cramped space, surrounded by two paramedics and two police officers.
5. Petitioner was being treated for several open wounds on his wrists and a life-threatening wound to his abdomen, from which his intestines were protruding. Further, Petitioner had low pressure, a high pulse, and was in shock.
6. Officer Zimmerman and Brader were also ordered by Sergeant Trimmer to "maintain, you know, with contact with him as far as that was possible." (emphasis added). Reinert's parents were prevented by the police from accompanying the petitioner to the hospital.
7. At the hospital, Reinert was continually kept under guard, even while he was in the "Code Red" room of the hospital being prepared for surgery.
8. Officer Zimmerman, who remained outside the "Code Red" room, ordered Nurse Gavigan to "note down anything that the patient said, that may be of use to him." During the treatment of the Petitioner, Nurse Gavigan reported to Officer Zimmerman two or three times.
9. The Ketner's were not given permission to leave Reinert's

home and go to the hospital to find out the condition of their son until around 4:00 p.m. The Ketner's arrived at the hospital at about 5 p.m., but were not allowed to see Reinert per orders of the police until the detectives, who had not yet arrived, questioned Reinert. Reinert and his parents were again kept isolated from each other.

10. Both before and after surgery, Reinert remained under police guard. Reinert was questioned by Detectives Stauffer and Granitz later that evening.

11. Detectives stood on either side of the Petitioner's hospital bed with the curtains around the bed drawn and questioned the Petitioner for approximately 45-50 minutes, during which Reinert allegedly gave an incriminating statement. After which, Petitioner remained under police guard.

An individual's constitutional rights under the Fifth Amendment of the Constitution require that a defendant be instructed of his Miranda rights so long as that individual is in custody and is subject to interrogation. Custodial interrogation does not require that the police make a formal arrest or intend to make an arrest.

Petitioner was isolated by police authorities from family members, including in the ambulance and at hospital.

Petitioner was physically incapable of movement under his own power, as he desperately needed medical treatment and, as such, necessarily had to stay in the ambulance and go where he was brought. Even if the Petitioner was capable of movement, the police would not have allowed him to go anywhere unaccompanied. Anyone under these circumstances would reasonably believe that their freedom was significantly restricted and in police custody.

STATEMENT MADE WHILE IN THE AMBULANCE

Petitioner allegedly made statements while being treated in the ambulance, in custody, and before he was read his Miranda rights by Officer Zimmerman.

Petitioner's response to police questioning was the product of direct custodial examination by a police officer prior to the Petitioner being advised of his Miranda rights. Officer Zimmerman's question, "what happened", following as it did

Paramedic Snyder's directive, "I think you ought to step in", is a question which Officer Zimmerman should have known was reasonably likely to elicit an incriminating response from the Petitioner. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Prior thereto, Officer Zimmerman should have advised the Petitioner of his Miranda rights. Interrogation encompasses not only actual questions directed at an individual by the police, but also any words, actions, or practice by the police which they should know are reasonably likely to elicit a confession or other incriminating responses from the individual in custody.

THE PARAMEDICS WERE AGENTS OF THE POLICE

The statement allegedly made by Petitioner to paramedic Snyder should also be suppressed, as paramedic Snyder was acting as an agent or instrumentality of the police when, upon hearing the statement made by Petitioner, he "turned to the officer that was directly behind me, which was Officer Zimmerman, and said I think you ought to step in," Id. Paramedic Snyder testified that he really "directed the officer that he may want to start talking to the witness..." N.T., Vol. I, 62 (emphasis added). Thus, the statement is suppressible for two independent reasons. First, the relationship between the paramedics and the the police was such that the paramedics were working as extensions of the police and assisting them in any way possible. The police were allowed, to the exclusion of Petitioner's parents, who would have been helpful in providing information critical to Reinert's treatment, such as allergies, to sit in on Reinert's treatment. The police were allowed, and apparently had license to, ride with the Petitioner and the paramedics to the ambulance. Officer Zimmerman's statement that "...we did ask him. I directed a question," S.N.T., 8/20/91, 50, supports Petitioner that the paramedics and police, in this instance, worked so closely with one another the paramedics were the constructive agents of the police. The fact that the paramedic would even call Officer Zimmerman's attention to the statement, or direct the Officer to question Petitioner, supports this agency contention. A private citizen who volunteers or is requested to question the subject becomes an agent of the government and becomes bound by Miranda.

Second, the fact that Zimmerman and Lembach were ordered to follow the Petitioner to the ambulance and sit in on the examination and questioning by the paramedics was, in effect, impermissible conduct or actions which the officers reasonably should have known would elicit incriminating statements.

More egregiously, the officers presence placed the Petitioner in an untenable position, he could respond to the questions asked of him by the paramedics and receive medical attention and, as a consequence, state incriminating evidence; or he could refuse to answer questions, thereby running the risk of failing to obtain much needed medical attention. This is a type of behavior that Constitutional law and public policy should condemn. Law enforcement should not benefit from such a situation. In fact, this conduct raises due process concerns under the U.S. Constitution. In any event, an individual facing such a dilemma should at least be apprised of his Miranda rights so he can make an informed decision about self-incrimination.

HOSPITAL STATEMENT BEFORE SURGERY

Petitioner makes another statement in the hospital's "Code Red" room while being prepared for the emergency surgery needed to stitch up his slashed wrists, repair his damaged liver, and place his intestines back in his abdomen. Petitioner's room was guarded by uniformed police officers, S.N.T., 8/20/91, 55, and he thus contends that his freedom of action was restricted so that he was in custody. Thus, not only had the police utilized the ambulance for their purpose, but had achieved a presence at the hospital and were in a position to make demands upon emergency room staff to gather information for them. Mr. Gavigan and his partner, Nurse Lombardo, then took time from their treatment of Petitioner, who suffered severe, potentially life threatening wounds, N.T., Vol. IV, 74, to write down the things said by Petitioner in answer to their questions. S.N.T., 8/20/91, 79. Nurse Gavigan, although he already had the EMS report detailing Petitioner's wounds, including Reinert's statements about how the wounds were caused, again questioned Petitioner. Even more egregiously, Nurse Gavigan came out

of the emergency room two, S.N.T., 8/20/91, 90, or three, Id. at 70, times to inform the police what happened while he was treating the Petitioner. Nurses Gavigan and Lombardo acted as agents, or instrumentalities, of the police, and took advantage of the patient-medical provider relationship, and Petitioner should have received his Miranda rights prior to such questioning, which also raises due process concerns.

INCAPABLE OF WAIVER

Two statements independently raise the question whether Petitioner was physically and mentally capable of knowingly, intelligently and voluntarily waiving his constitutional rights. The first of these two statements was made to Officer Zimmerman in the ambulance. The second a post-operative statement, was the most damaging statement made by Reinert in which he states that at some point he got a butcher knife. This statement was made to Officer Stauffer shortly after Petitioner had undergone 2-1/2 hours of surgery. The trial court concluded that both these statements were confessions made after a voluntary waiver of Petitioner's constitutional rights. Opinion, App. "A", 29a-32a. However, Petitioner's medical condition at the time of both statements was such that a knowing, intelligent and voluntary waiver of his rights was impossible. See Affidavit of Scot Reinert, App. H, Affidavit of the parents, App. I, App. J, Affidavit of prior trial counsel, App. K, detailed 5 page Affidavit of Dr. Sadoff, App. G, ("Thus, it is for all these reasons that it is my opinion, within reasonable medical certainty, that at the time of the taking of the statement by the police...his [Petitioner's] mental state was not clear enough for him to be competent to waive his Miranda Warnings or to give a truly voluntary statement".) App. G, ; detailed 4 page Affidavit of Dr. Bornfriend, App. F, ("Any statements made in the ambulance cannot be considered voluntary, because of his medical and psychiatric condition, and the severity of the medical and psychological stressors in this case leads me to believe with a reasonable degree of medical certainty that Mr. Reinert was incapable of knowingly and intelligently waiving his Miranda Rights."). App. F. Also see supplemental letters of Dr. Sadoff, App."GG", and Dr. Bornfriend, App.FF, emphasizing their position and availability to have testified.

The Commonwealth must show, by a preponderance of the evidence, that the waiver of Miranda rights was knowing and intelligent, and that the accused was aware of both the rights and of the risks of forfeiting such rights. While the test of whether the confession was voluntary and the waiver of the Miranda rights was valid is one of the totality of the circumstances, Courts must consider: the duration and method of interrogation, condition of detention, manifest attitude of the police toward the accused, accused's physical and psychological state, and other conditions which may serve to drain one's powers of resistance to suggestion and undermine his self-determination.

In determining voluntariness, it is important to note that sickness, mental trauma, and ill health may well influence an accused's will to resist.

An individual, while being questioned, is capable of answering "yes" and "no" to Miranda warnings and answering questions put to him by police interrogators is not necessarily evidence of an intelligent and knowing waiver of his Miranda rights.

For example, in Commonwealth v. Perry, 475 Pa. 1, 379 A.2d 545 (1977), the court recognized that the line between a voluntary and involuntary confession is composed of subtle gradations. The question is whether the confession is the product of an essentially free and unconstrained choice by its maker. Perry, was in pain, hospitalized, under police guard and had not seen a friendly face for more than twelve hours at the time of his interrogation. The court, ruled the statements were not voluntarily or intelligently made. Id. at 8.

The Pennsylvania legislature has recognized, through 42 Pa.C.S.A. 7101, that decisions made by injured parties in a hospital are suspect, and raise serious questions whether such decisions should be recognized as valid.

INCAPABLE OF WAIVER IN THE AMBULANCE.

After subjecting Reinert to custodial interrogation without the benefit of Miranda warnings, and receiving an allegedly incriminating statement, Officer Zimmerman read Reinert his Miranda warnings, and described Reinert's

response to the question, "do you understand these rights" in the following way: "As best he could, yeah, he -- they were working on him and he, you know, he kind of nodded and then he said yes or yeah." Id. at 52 (emphasis added). Zimmerman then further questioned Reinert who allegedly said "I stabbed him. I think I killed him." Id. at 143. Lembach remembers Reinert's alleged waiver differently, in that Reinert supposedly answered "yeah" to both Miranda questions (Do you understand your rights? Do you waive them?). N.T., Vol. 1, 110. The fact that Reinert was capable of nodding his head and/or saying 'yes' or 'yeah' to questions put to him by Officer Zimmerman is not indicative of an intelligent and knowing waiver of his rights, especially given that the two officers present conflicting testimony as to the nature of his alleged waiver, his response to the question, according to one of the officers, included a kind of nod of his head, which at that point was covered by an oxygen mask, and Reinert was suffering from grievous, life-threatening injuries. N.T., Vol. IV, 74. Officer Zimmerman then asked Reinert who he had killed, and he responded, "Sean, Sean Brady," , "with a butcher knife." Id. at 52-3. The first mention of a butcher knife.

It is important to consider Reinert's alleged waiver in the context of his mental and physical condition. Reinert was being treated for his life threatening abdominal wounds, N.T., Vol.IV, 74, from which his intestine was protruding, N.T., Vol I., 81, 162, and which had caused his liver to be sliced, a wound to his ankle or foot, and multiple wrist wounds. The deep multiple wrist wounds were caused during Reinert's first two suicide attempts with a knife and razor blades. He lost a quart of blood. Id. at 75. Reinert ingested two boxes of sleeping pills with wine in a third attempt to kill himself. N.T., Vol. VII, 126. His parents testified that Reinert was hallucinating when they arrived. S.N.T., 44; S.N.T., 30. Paramedics had just escorted him from the house by his arms, and he was prone on the stretcher in the ambulance, receiving lactator ringers through intravenous injections, S.N.T., 8/20/91, 19. Reinert was wearing an oxygen mask, N.T., Vol. I, 145 and was connected to an electrocardiogram, Id at 47-48. Reinert complained to the paramedic of pain. A police officer was blocking one exit from the ambulance, the interrogating officer was hovering above Reinert's head, and

the two paramedics were close to him as well, still treating his injuries. Despite the importance of giving the correct information about allergies to treating personnel, Id. at 84, Reinert incorrectly told Snyder he didn't have any allergies. Id. at 84. Later, Reinert incorrectly told Gavigan, who was preparing him for surgery, that he was allergic to penicillin. S.N.T., 8/20/91, 89. Reinert's mental acuity was seriously diminished.

Further indicative of Reinert's weakened mental and physical condition was Reinert's failure, despite suffering from a life threatening stab wound to the stomach, N.T., Vol IV, 74 to inform the treating paramedics of this injury; it was treated only after the paramedics discovered it themselves. S.N.T., 8/20/91, 14. See Affidavit, Dr. Bornfriend ("Despite his first being attended to in the house, his walking to the ambulance and the initiation of treatment in the ambulance, at not time did Mr. Reinert make the EMT's aware of several abdominal wounds, including a wound extruding the small bowel and mesentary. His wounds were discovered incidentally as the paramedics checked his vital signs. Only someone significantly disoriented would be so disassociated from his cognitive processes as to fail to bring these serious wounds to the attention of medical personnel."). App. F.

The trial court also relied heavily, in determining that Reinert was able to waive his rights, Opinion on the paramedic's conclusion that Reinert was "conscious, alert, and oriented times three." S.N.T., 8/20/91,12. However, "[e]ven a paranoid schizophrenic may be oriented to three spheres, but still be unable to cognitively understand and rationally waive his Miranda rights." Affidavit Dr. Bornfriend. App. F. Affidavit, Dr. Sadoff. App. G,: Affidavit, Dr. Bornfriend.

INCAPABLE OF WAIVER AFTER SURGERY.

Petitioner allegedly made his most damaging statement to Detective Stauffer while recovering from surgery in his hospital room. Reinert's parents and friends were prevented from seeing him, per police orders, S.N.T., 8/20/91, 149, until after he spoke with the police, S.N.T., 8/21/91, 34. Petitioner was isolated for approximately 8-1/2 hours.

Although Detective Stauffer read Mr. Reinert his Miranda rights, Petitioner's physical and mental condition was such that he was incapable of cognitively waiving those rights.

After sending out the two police officers who were present in Petitioner's room, guarding him, S.N.T., 8/20/91, 135, the two police detectives questioned the Petitioner, who was attached to I.V.s and "banks of monitors or equipment." Id. at 197. They stood on either side of his bed, towering over him, and the curtain was drawn, Id., so that it surrounded his bed and placed him in complete isolation with the two officers. The police testified that to hear the Petitioner they had to lean over his head, while he lay prone and immobile beneath them. Id. at 166. While the two detectives have differing accounts of the incident, Petitioner, per Detective Granitz, allegedly acknowledged the first question (Do you understand these rights) by saying 'yes' and allegedly acknowledged the second (Do you waive these rights) by the equivocal nodding his head. Id. at 188. Detective Stauffer testified that the Petitioner acknowledged both questions with a "yes." Id. at 137. The fact that the Petitioner was capable of nodding his head and/or saying 'yes' or 'yeah' to questions put to him by Officer Zimmerman is not indicative of an intelligent and knowing waiver of his rights, especially given the two detectives present conflicting testimony as to waiver.

The detectives who questioned Petitioner were in a physically oppressive and dominate position, standing over his prone body, while Petitioner, was recovering from emergency surgery in severe pain. Petitioner had just undergone surgery on his life-threatening wounds and been administered with powerful drugs. See Statement of Facts for a recitation of these drugs. Reinert most likely received morphine, a pain reliever, so late after his operation, at 10:00 p.m., Id at 7, only because the other medications he received were effective until then. Affidavit of Dr. Bornfriend, App. F [4]

[4] Dr. Bornfriend, "It was therefore, clear that the narcotic and sedative and muscle relaxant effects of these medications persisted and remained during the course of Mr. Reinert's being interviewed by the police and that when these medications wore off, Mr. Reinert was in severe pain and required 4 mgs. of morphine.

Reinert was unsure of what day of the week it was, and believed it was Monday instead of Sunday. Id. at 164. Petitioner made his statements minutes after the police began questioning him, answering questions for close to forty-five minutes, and only then were his parents, minister, and friend allowed in to see him. S.N.T., 8/21/91, 34. The Detectives traveled to the hospital directly from the police station yet, they failed to bring a tape recorder with them to memorialize their interrogation Reinert. Petitioner's family and friends testified that Reinert told them that he was in pain, and he was difficult to hear or understand. S.N.T., 8/21/91, 69-74. Petitioner's free will was overborne by the totality of the circumstances. Reinert was incapable of knowingly, voluntarily and intelligently waiving his rights. See Affidavit of Dr. Sadoff, App. G ; Affidavit of Dr. Bornfriend, App. F, and supplements, GG and FF.

SUBSEQUENT STATEMENTS TAINTED

Reinert also respectfully requests this Honorable Court, to the extent it determines that any or all of the above statements are inadmissible because they were made in violation of Miranda or were not voluntary, to also declare inadmissible all following statements, since they are "fruit of the poisonous tree." There has been an insufficient showing that the confession was 'an act of free will.'"

All the incriminating statements were made by Reinert within a nine hour period, while he was gravely wounded or in great physical pain, suffering severe mental anguish, under police guard, forcibly isolated from his family and friends, and undergoing pharmaceutical and medical treatment. Each subsequent incriminating statement was dependent on the prior incriminating statement, and Reinert, although allegedly read his Miranda rights twice before making incriminating statements, was not physically or mentally capable of employing the free will necessary to break the causal chain of suppressible statements.

3. Petitioner was denied his Fifth And Sixth Amendment rights to effective assistance of trial counsel, due process, and a fair trial where trial counsel

failed to: (A) call available expert medical and psychiatric witness to testify that Petitioner's physical and mental condition precluded a voluntary statement and/or a knowing, intelligent and voluntary waiver of his Miranda rights at the suppression hearing and/or at trial? (B) inform Mr. Reinert, a person with no prior record, of his right to testify at the suppression hearing? (C) testify, being a percipient witness of the condition of Petitioner at the time of his statement during the suppression hearing and at trial and/or withdrawn if necessary? (4) call an available expert to testify about the drug Prozac per the trial court's ruling - and further where Pennsylvania Courts have failed to order at a minimum an evidentiary hearing on ineffectiveness where no hearing has ever been held?

This case provides the opportunity for this Honorable Court to further evaluate effective assistance of counsel issues to assure that our adversarial system within the criminal justice system is properly functioning and adhering to minimum standards.

Pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984) the Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Here prior trial counsels performance was fundamentally deficient and it prejudiced Petitioner.

A. Among other things but failing to call expert witnesses (at suppression or trial) who were available and would and could have demonstrated unequivocally that Petitioner due to his severe medical and mental condition was unable to voluntarily give a statement and/or understand and/or knowingly and intelligently waive his constitutional rights, where the statements were critical to the Commonwealth first degree murder prosecution is and must be declared ineffective assistance of counsel.

The attached affidavits of Drs. Sadoff and Bornfriend

demonstrate these contentions. These affidavits were provided and made part of the record in the first appellate court, the Superior Court of Pennsylvania. The Appellate Court failed to provide relief or even order an evidentiary hearing on the matter.

As the Affidavit of Dr. Sadoff states, "Thus, it is for all these reasons that it is my opinion, within reasonable medical certainty, that at the time of the taking of the statement by the police...his [Reinert] mental state was not clear enough for him to be competent to waive his Miranda Warnings or to give a truly voluntary statement." The Affidavit of Dr. Bornfriend states, "Any statements made in the ambulance cannot be considered voluntary, because of his [Reinert] medical and psychiatric condition, and the severity of the medical and psychological stressors in this case leads me to believe with a reasonable degree of medical certainty that Mr. Reinert was incapable of knowingly and intelligently waiving his Miranda Rights." Moreover, Reinert's prior trial counsel was ineffective for failing to call these available expert medical and psychiatric witnesses to testify to the same. These witnesses have persuasively demonstrated that Mr. Reinert, who then was suffering from life-threatening wounds, was medically and psychologically incapable of making a voluntary statement or a valid waiver of his Miranda rights.

B. Trial counsel was ineffective in not informing Petitioner of his right to testify at the Suppression Hearing, not discussing with him the possibility of his so testifying, and not calling him to discuss his physical and mental state on Sunday, March 10, 1991, See Affidavit of Scot A. Reinert, App.H, all of which would have made clear the strength of his suppression motion. Without Reinert's incriminating statements, the prosecution's first degree case would have been seriously undermined. Reinert states in his affidavit:

> My attorneys at no time informed me of my right to testify at my suppression hearing. My testimony at that hearing would have supported the fact that certain evidence should not have been presented at my trial. . . .I was in no condition for police interrogation and certainly unable to understand, let alone waive, my Miranda rights. App.H.

Petitioner stated that his trial counsel did not advise him of his right to testify at the suppression hearing, that he was in no condition for police interrogation and that he was unable to understand or to waive his Miranda rights. Trial counsel's affidavit states that she did not advise Petitioner of his right to testify. See Aff. of Diane Dickson, Esquire. App.K.

C. Trial counsel was ineffective for failing to testify at Petitioner's suppression hearing/trial, as two of his future trial counsel visited him at the hospital on the night of March 10, 1991, N.T., Vol. V, 160. Either of the trial counsel were in a position to testify to the Petitioner's mental and physical condition, See, Aff.Charles and Janet Ketner, App.I, App.J,and then permit the other to remain counsel for the duration of any hearing. See counsel affidavit, K.[5] See Pennsylvania Rules of Professional Conduct, Rule 3.7, especially since the fact-finder at the suppression hearing was a judge, and the jury would be unaware that trial counsel ever acted as a witness. Barring that, counsel should have withdrawn to act as a witness in the proceedings. After the results of the suppression hearing were known, counsel could then determine whether they needed to testify at trial, and if necessary, they should have done so pursuant Rule 3.7, or withdrawn.

D. Reinert's prior counsel was egregiously ineffective in not presenting expert testimony regarding Prozac's suicidal-provoking tendencies. Despite the trial court's refusal to allow lay testimony without corresponding expert testimony, trial counsel never secured, or called to the stand, an expert witness to testify about the effects of Prozac on the victim or other individuals who took the drug, even though

[5] "I arrived immediately after the detectives finished taking Mr. Reinert's statement. I witnessed Mr. Reinert's condition at that time, and in my view he was completely 'out of it'; he was not coherent, was in a great deal of pain, was not in a condition to make a statement, was not competent to make a statement, nor was he capable of understanding or knowingly and intelligently waiving his Miranda rights. App. K para 4. "...no strategic basis for such failure" (to testify). para 5.

Reinert himself presented trial counsel with one such expert. See Affidavits of Charles and Janet Ketner. App.I, App.J. Also see, trial counsel affidavit, K[6] The failure to present this particular evidence prevented Reinert, from providing evidence for the purpose of filling in gaps in the defendant's story, which were created because he could not use the word "Prozac," negating motive, and proving Reinert's state of mind at the time of the stabbing. Prozac caused suicidal or violent tendencies in those that took it, and expert testimony on the drug would have been easily obtained, obviously including herself. Affidavit, Dr. Bornfriend. App.F, App.FF. Further, the drug itself was a very controversial one among the scientific community, and the actual side-effects of Prozac were widely debated. Id. In addition, Dr. Bornfriend's report states that, at the time, Prozac was a source of much familial disharmony between those who took the drug and their loved ones. In all, Dr. Bornfriend reviewed over two pages of information explaining the problems of Prozac, her awareness of those problems, and why it was important to have someone testify about Prozac in regard to Reinert's defense. Her supplemental affidavit further underscores her then availability as a witness. App.FF. Similarly,Dr. Sadoff, GG.

4. Petitioner was denied a fair trial when the trial court declared all lay testimony concerning the victim's use of prozac inadmissible and violated his Fifth and Sixth Amendment Rights.

The right to present evidence in his defense is a fundamental right protected by the U.S. Constitution. Chambers v. Mississippi , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The trial court's determination that all lay testimony concerning the victim's use of Prozac was inadmissible deprived the Petitioner of an opportunity to rebut motive, the Commonwealth's theory of the case, an opportunity to

[6] "Although I was provided with a resource to obtain an expert witness for trial regarding Prozac, I unfortunately did not follow through with that information, and no expert was called at trial. There was no strategic basis for such failure. App. K, para. 3.

demonstrate his state of mind and reduced level of intent, and provide the jury with his factual version of events, thereby denying him a fair trial.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
THEODORE SIMON
Counsel for Petitioner